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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001774-MR

NORMA RAMAGE; JAMES RAMAGE — APPELLANTS

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 05-CI-00198

SHELLY HUMPHREY (N/K/A WELCH); BRIAN K. SMITH — APPELLEES

OPINIONS
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: Norma Ramage and James Ramage, aunt and uncle and de facto custodians of S.H., appeal from an order of the Livingston Circuit Court

[1] David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

awarding sole custody of the child to his father, Brian K. Smith. For the reasons stated hereinafter, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Brian is the father and Shelly Humphrey is the mother of S.H., born August 10, 2004. S.H. was conceived in November or December 2003. Brian and Shelly were married and residing in Livingston County at the time. In late December 2003, Brian and Shelly separated, and Brian relocated to Madison, Indiana. He did not know that Shelly was pregnant at the time of the separation.

Brian had no contact with Shelly until March 2004, at which time she told Brian that she was pregnant. Shelly, however, misrepresented to Brian that Troy Humphrey, not Brian, was the father of the child. Troy had been a source of dissension between Brian and Shelly at the time of their separation, with Brian suspecting that Shelly was having a relationship with him.

S.H. was born on August 10, 2004, with Brian still unaware that he was the father of the child. Because of Shelly's ongoing personal problems, including substance abuse, S.H. was placed with appellants James and Norma Ramage. Norma, who is married to James, is Shelly's sister.

It was not until December of 2005, sixteen months after the birth of the child, that Brian learned that he was the father of S.H. Immediately thereafter, Brian contacted counsel and began establishing a relationship with his son. Brian informed the

Ramages that while he intended to maintain a good relationship with them, he also intended to seek custody of his child.

With the awareness that Brian intended to seek custody of S.H., on December 19, 2005, the Ramages filed a Petition for Custody in the Livingston Circuit Court. The petition alleged that the Ramages were the de facto custodians of S.H. and that it was in the child's best interest that they be awarded his sole custody. In his response, Brian denied that the Ramages were the de facto custodians of S.H. or that it was in S.H.'s best interest to be placed in their custody. Brian further contended that he should be awarded sole custody of the child. Shelly has supported the Ramages' petition throughout the litigation, including in this appeal, except that she has sought to be awarded joint custody along with the Ramages.

Following a hearing, on July 20, 2006, the trial court entered an Order and Judgment determining that the Ramages were the de facto custodians of S.H., but that it was in the best interest of the child that Brian be awarded sole custody. The Ramages and Shelly filed motions to alter, amend, or vacate, which were denied. This appeal followed.

The appellants contend that the circuit court incorrectly applied the law concerning de facto custodians, that the circuit court erred by allowing a social worker to give an opinion as to permanent custody placement, that the circuit court's findings of fact were not supported by substantial evidence, and that the circuit court abused its discretion when it determined that Brian was entitled to sole custody of S.H.

CIRCUIT COURT CUSTODY ORDER

We begin by setting forth the relevant sections of the circuit court's July 20, 2006, order. Because of the Ramages' broad challenge to the order, we set forth the order at length:

> The chronology of the conception, birth and early days of this infant are critical to this case. When S.H.[2] was conceived in November or December of 2003, the biological mother and father were married to one another. In late December, 2003, the mother and father separated. The father, hereinafter known as Brian, moved to Madison, Indiana where he now lives. At the time he did not know that the Respondent/mother, hereinafter known as Shelly, was pregnant. Brian did not hear from Shelly until March of 2004.
>
> In that telephone conversation, Shelly advised Brian that she was pregnant but that the baby she was carrying was not his. Shelly stated the putative father to be Troy Humphrey. Humphrey had been the subject of [a] volatile argument which had taken place just prior to the separation of the parties back in December 2003. Brian had accused Shelly of attempting, or perhaps even consummating an affair with Humphrey which she denied at the time.
>
> It was not until December of 2005 that Brian was startled to learn that he was the biological father of sixteen month old S.H.. Immediately upon learning this news, he contacted counsel and began trying to establish a relationship with his child. He traveled to Livingston County, Kentucky and advised the Petitioners who then had custody of S.H. that he intended to maintain a good relationship with them, but that he also intended to try and get custody of his child. Apparently faced with this possibility, the Petitioners filed this action on December 19, 2005.

[2] The circuit court's order uses the actual name of the child. In order to protect the privacy of the child, we have substituted his initials in lieu of his actual name.

Shelly, the mother of S.H. and three other children, has had a very tumultuous and unstable life. Her seven-year old daughter, Ashley, is also in the custody of the Petitioners. Two other children are in the custody of their natural father, Jim Curnel. Because of Shelly's long history of drug use and her turbulent lifestyle with various mates, including five marriages, S.H. was placed with the Petitioners, James and Norma Ramage, at birth.[3] They have had custody of S.H. since that time and Shelly has had a sporadic relationship with the child.

Since learning of the paternity of S.H., Brian has demonstrated a full commitment to the responsibilities of parenthood. He had visitations with his child every other weekend and has had to travel to Kentucky from Madison, Indiana - a four hour drive - to enjoy this privilege. With the exception of a couple of missed visits, he has been faithful in this endeavor and has also maintained child support payments.

Pursuant to KRS 403.270, a de facto custodian must show by clear and convincing evidence to have been both the primary caregiver and the financial supporter of a child for an extended period of time. If the child is under three years of age this period of time is six months, such as is the case in S.H.'s situation. If the child is three or older or has been placed by the Department for Community Based Services, then the time is one year or more.

First, the Court finds by clear and convincing evidence that the Petitioners are de facto custodians pursuant to KRS 403.270(1)(a). They have satisfied all requirements as to the time S.H. has been in their custody as well as the degree of financial support they have provided.

Kentucky's de facto custodian statute is not triggered unless the natural parent abdicates his or her role of primary caregiver by allowing another person to fulfill that function for a significant period of time. Any period of time after a legal proceeding has been commenced by a parent seeking to

[3] The Ramages state that S.H. was placed with the Ramages Easter weekend of 2005.

regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period. Clearly, Shelly abdicated her role as primary caregiver of S.H..

Nevertheless, the law recognizes the preference for a biological parent. *See Boatwright v. Waler*, 715 S.W.2d 237 (Ky.App. 1986) quoting KRS 405.020.[4] [Footnote in original] Certainly, parents who have maintained relationships with their children, have not shown themselves to be unfit, and have not knowingly encouraged or acquiesced in quasi-parental relationships with third parties should enjoy a preference in custody determinations. Since 1998, however, if a non-parent can prove by clear and convincing evidence that he or she is a de facto custodian, the non-parent will have the same standing as a natural parent and the court will proceed directly to a "best interests" determination as between non-parent and parent. Significantly, courts must give "equal" consideration to a parent and any de facto custodian. In determining custody cases, the trial court must consider all relevant factors [contained in KRS 403.270].

. . . .

Prior to the passage of KRS 403.270, parents could not lose custody of their children absent a showing of unfitness by clear and convincing evidence. It is unclear whether the underlying purpose of this statute is geared to the best interest of the child or the inherent right of the parent.[5] [Footnote in original]. But certainly it is intended to protect children from arbitrary separation from those with whom they have been allowed, by action of their natural parents, to look upon as parental figures. In other words, it provides some protection

[4] See also Elizabeth Ashley Bruce, A Parent's Right Under the Fourteenth Amendment: Does Kentucky's De Facto Custodian Statute Violate Due Process? 92 Ky LJ 529 (2003-2004).

[5] This "inherent right" is addressed in the grandparents versus parent decision of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In *Troxel* the U.S. Supreme Court ruled that a Washington grandparent visitation statute impermissibly infringed on the natural parent's right to the care, custody and control of his or her children without requiring a showing of unfitness.

from a child being torn apart from a bonding relationship unless it is in the child's best interest.

But for the de facto custodian status of the Petitioners in this case, this would be a no-brainier for the Court. While both the Petitioners are fine and upstanding people, there has been no showing that the natural father, Brain K. Smith, is unfit, and but for the de facto status of the Petitioners he would be entitled to custody of his child. Accordingly, the Court must determine what is in the best interest of S.H. regarding his future custody.

Unfortunately, Kentucky courts have used the best interest standard without defining its explicit content. In *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995), the Kentucky Supreme Court held the best interest standard did not apply absent clear and convincing proof that the father had waived his superior right to custody. A trilogy of cases from the Kentucky Supreme Court recognize a parent's superior right to obtain custody of a child stating that the best interests of the child may only be considered once the natural parent is shown to be unfit. *McNames v. Corum*, 683 S.W.2df 246 (Ky. 1985); *Davis v. Collingsworth*, 771 S.W.2d 329 (Ky. 1989); and *Fitch v. Burns*, 782 S.W.2d 618 (Ky. 1989).

In *Poe v. Poe*, 711 S.W.2d 849 (Ky.App. 1986) the Kentucky Court of Appeals upheld a trial court's determination giving the father custody of his nine-year old son. The trial court relied on testimony from expert witnesses that the father would provide the best psychological role model for the child. Other Kentucky appellate cases have rejected the need for psychological testimony to support a best interest determination. In *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983), the Kentucky Supreme Court permitted the trial curt to avoid discussion of the children's psychological needs and to base its decision entirely on a judgment regarding a custodian's morality.

The emphasis on the impact of changed custody on a child is not a novel concept. Justice Joseph Story recognized long ago that the only question is whether returning the child to the

parent will be for the real, permanent interests of the infant. *United States v. Green*, 26 F.Cas. 30 (C.C.D.R.I. 1824)(No. 15,256). More recently, in *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002), the appellate court noted the importance of the parents' liberty interest in raising their own children but ruled that the de facto custodian statute was not unconstitutional.

Undoubtedly, the Petitioners are good and stable people who provided critical nurturing and care for this young child at a time when he most needed it. Although there has not been a bonding with Shelly because of her unfitness, S.H. no doubt has bonded with the Petitioners, especially Norma. In addition, there is one half-sister, Ashley, who resides in the Petitioners' home with S.H.. S.H. also has two other half-sisters who he knows and sees on a regular basis. In other words, since birth S.H. has been in a family setting where he has bonded with his aunt and uncle as well as his siblings. And while the relationship with his mother Shelly has been sporadic at best, she nevertheless has always been close by.

On the other hand, there is much to be said for the father, Brian. There are only two negatives that deserve comment. One involves the incident in December of 2003 where Brian allegedly pulled a shotgun and threatened to shoot Troy Humphrey if he showed up at the parties' home. Brian and Shelly gave contradictory versions of what happened. The Court accepts Brian's version. The third party witness who was present was Shelly's young daughter, Jennifer. Jennifer had to reflect and was hesitant before testifying that she actually saw the gun in Brian's hands. Also, the credibility of Shelly is undermined in many ways. One such way is that she denied the relationship with Troy Humphrey, yet at the same time made in excess of seventy calls to him. Undoubtedly, this confirmed any suspicions Brian may have had when Shelly related to him back in March of 2004 that she was pregnant by Humphrey.

The most troublesome negative as far as Brian is concerned is the fact that he is now living with a woman to whom he is not married. The Court takes a negative view of such

arrangements. Sadly, however, and to the Court's chagrin, this type of living arrangement is becoming more the norm in our society. Were every child removed from a mother or father who was living with someone to whom they were not married, there would be a cataclysmic and unsettling movement of children from their present homes.

The Court acknowledges that Brian's girlfriend, Dawn Fox, appears to be a bright, caring person who has custody of her own two children. Dawn and her children, as well as her parents and sister, all wish to become part of S.H.'s family. Also, Brian's two children from a previous marriage visit with their father on a regular basis. And Brian's extended family consisting of his parents, grandmother, two sisters and a brother are very eager to embrace S.H. into the family.

Although a de facto custodian must be given equal consideration, the statute does not make de facto custody a dispositive factor. Court's must still consider a number of statutory factors designed to help determine the child's best interests. One of the main statutory factors that this Court must consider is the **circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian**. *See* KRS 403.270(2)(i). [Emphasis in original]. The statute cautions a court to consider whether the parent has been prevented from seeking custody as a result of domestic violence. Surely, this Court should also consider the fact that Brian was unaware that S.H. was his biological child at the time the child was placed in the custody of the Petitioners.

Parental motives and attitudes have affected courts in grandparent visitation cases, and the same possibility exists in the area of de facto custody. This Court agrees with the long held understanding of child development professionals that young children often form important attachments to caregivers within one to two years. The Petitioners are to be highly commended for their role as S.H.'s psychological parents.[6] [Footnote in original]. But the Court cannot ignore

[6] This term is often defined as the individual the child perceives, on a psychological and emotional level, to be his or her parent.

> the circumstances under which S.H. was placed in the custody of the Petitioners. The father, Brian, was denied custody through no fault of his own and is now basically relegated to a visitor's role. If this arrangement continues he will surely lose the right to make significant decisions regarding S.H.'s upbringing.
>
> Not only does Brian have a right to raise his own child, but S.H. also has a right to be reared by his own father if that father is a fit and proper person. It is in S.H.'s best interests. Neither Brian or his girlfriend have a criminal background or a history of past or current drug abuse. Brian is employed full-time and earns a modest salary sufficient to meet his family's needs. More importantly, Brian wishes to provide for S.H.'s physical, mental, emotional, spiritual and financial well-being.[7] [Footnote in original]. . . .

PROPER LEGAL STANDARD

We first consider the Ramages' argument that the circuit court applied the incorrect legal standard in its custody determination. In summary, the Ramages contend that the court failed to properly recognize their statutory right to equal custody consideration after they had been qualified as de facto custodians. We disagree.

The court's recognition of the proper legal standard is illustrated by the following section of its decision:

> Since 1998, however, if a non-parent can prove by clear and convincing evidence that he or she is a de facto custodian, the non-parent will have the same standing as a natural parent and the court will proceed directly to a "best interests" determination as between non-parent and parent.

[7] The relative assessment summary of the Department of Child Services identified no concerns that would preclude Brian Smith from being named as S.H.'s custodial parent, and therefore recommended that consideration be given for S.H.'s placement with his father. In fact, the Department recommended custody be awarded to his father.

> Significantly, courts must give "equal" consideration to a parent and any de facto custodian.

Based upon the plain language of its order, the circuit court applied the statutory requirement contained in KRS 403.270(1) that a de facto custodian is to be given, as a beginning point, equal consideration with the parent in a custody dispute.

Nevertheless, the Ramages argue that various case citations contained in the order predating the passage of the 1998 de facto custodian amendments to KRS 403.270, the trial court's statement to the effect that the law recognizes a preference for a biological parent, and its reference to Brian not being an "unfit" parent, all evidence the application of an improper standard.

We construe the purpose of the circuit court's citations to pre-1998 cases as being to give context and background to its decision, not as authority applied inconsistent with the de facto custodian amendments. Likewise, the court's statement to the effect that the law recognizes a preference for a biological parent was, as we construe it, for the purpose of background and context. Finally, we construe the court's statement to the effect that Brian is not an unfit parent as simply a finding relevant to its decision and not an application of the pre-de facto custody standard that a biological parent must be determined to be unfit in order to be deprived of custody.

In summary, we conclude that the circuit court applied the proper legal standard in this case, and we do not find reversible error in the court's statements identified by the Ramages.

REVIEW OF CUSTODY DECISION

Next, we consider the Ramages' argument that the court's findings of fact were not supported by substantial evidence and that the court abused its discretion when it found that Brian was entitled to sole custody of S.H.

Concerning our standard of review, in custody matters tried by a court without a jury, the court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rule of Civil Procedure (CR) 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Sherfey*, 74 S.W.3d at 782. "Substantial evidence" is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Id.* As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." *Id.* at 39.

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *Sherfey*, 74 S.W.3d at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation. *See Futrell v. Futrell*, 346 S.W.2d 39 (Ky.1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000). "Abuse of discretion in relation to the exercise of judicial power

implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey,* 74 S.W.3d at 783. Essentially, while "[t]he exercise of discretion must be legally sound," *id*., in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

The findings of fact contained in the circuit court's custody decision are supported by substantial evidence - the testimony presented at the evidentiary hearing and upon the record as a whole - and, accordingly, are not clearly erroneous. In fact, the Ramages specifically challenge only one "finding" - the finding that it is in the best interest of S.H. to be placed in the sole custody and care of his father. We, however, consider that determination to be an application of the circuit court's discretion based upon its findings of fact, not a finding in and of itself, and consider that issue below.

We next consider whether the circuit court abused its discretion by determining that it was in the best interest of S.H. that Brian be awarded sole custody.

The following factors in KRS 403.270(2) are to be used by the court in determining the best interests of the child:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
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> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved;
>
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
>
> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
>
> (h) The intent of the parent or parents in placing the child with a de facto custodian; and
>
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Our reading of the circuit court's custody decision and the record as a whole discloses that the circuit court did not abuse its discretion in awarding sole custody to the child's biological father in preference to his aunt and uncle.

The court carefully noted the fitness of Norma and James to be the permanent custodians of S.H. and the bonds that had been formed by S.H. with them and S.H.'s half-siblings in Livingston County. However, the court also determined that the father was a fit custodian in all respects. The court then made the difficult decision that it

was in the best interest of S.H. to be raised by his biological father. Because that decision was not an abuse of the circuit court's discretion, it will not be disturbed by this court.

In addition, an overarching consideration in this case is the circumstances under which S.H. was placed with the Ramages and which led to their de facto custodian status and corresponding equal footing with Brian in the custody dispute. Central to those circumstances was the deception of Shelly in misleading Brian concerning his parenthood of S.H. Based upon his conduct subsequent to learning of his parenthood, Brian undoubtedly would have pursued custody of S.H. from the outset but for Shelly's fraudulent misrepresentations that Troy Humphrey was the father. It follows that the Ramages would not have obtained their de facto custody status but for Shelly's deception, and Brian would not have been deprived of his superior right to custody by the Ramages qualifying as de facto custodians.

We believe the legislature incorporated KRS 403.270(2)(i) into the de facto custodian scheme for application in situations such as this. KRS 403.270(2)(i), requires the court to consider in its best interest analysis "[t]he circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian[.]" The circuit court obviously applied great weight to this section in its decision, and it was within its discretion to do so. We, too, are disturbed by Shelly's inexcusable disrespect for the parental rights of Brian. We believe that the circuit court appropriately applied KRS 403.270(2)(i) as a factor of significant weight in its custody determination.

Similarly, we find no abuse of discretion in the circuit court's decision to award sole custody to Brian rather than joint custody along side the Ramages. Upon the record as a whole, this was a sound exercise of the circuit court's discretion.

In short, we will not disturb the court's custody decision in this matter.

SOCIAL WORKER TESTIMONY

We next consider the Ramages' argument that the circuit court erred by allowing a social worker to give an opinion concerning custody in this case. At the evidentiary hearing the court permitted Debbie Richey, a social worker for the Cabinet for Families and Children,[8] to testify and to give her opinion in favor of Brian being awarded custody of S.H.

The qualifications of an expert witness are governed by Kentucky Rules of Evidence (KRE) 702 and 703, which vest the trial court with broad discretion in determining whether a witness is qualified to express an opinion in a matter that requires expert knowledge, skill, experience, training, or education. These rules require the trial court to determine if such expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577-79 (Ky. 2000).

The record discloses that Richey is a long-term social services clinician for the Cabinet and that she has experience in conducting home evaluations for courts regarding the placement of children and making recommendations to courts regarding

[8] Now the Cabinet for Health and Family Services

custody of children. Richey had been involved with Shelly and her family for seven years, had been involved with S.H. since his birth, and had an open case regarding Shelly. In fact, Richey was the social worker who placed S.H. with the Ramages.

Based upon the foregoing, we are not persuaded that the circuit court abused its discretion in permitting Richie to testify, particularly since the testimony was presented to an experienced trial judge rather than a jury. In short, the Ramages concerns go to the weight and credibility of the evidence, not its admissibility.

CONCLUSION

The judgment of the Livingston Circuit Court is affirmed.

ALL CONCUR.

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